IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 219 OF 2003

1. State of Goa,
   by the Chief Secretary,
   Secretariat, Panaji,
   Goa, and

2. The Executive Engineer,
   Works Division IX,
   (P.H.E.), P.W.D.,
   Fatorda, Margao, Goa. ... Appellants.

Versus

K. Hassainer, major
of age, H.No.139/1,
Colleanordi, Quepem,
Goa, 403705. ... Respondent.

Shri S. R. Rivankar, Government Advocate for the appellants.

Shri C. Mascarenhas, advocate for the respondent.

CORAM : SMT. NISHITA MHATRE, J.

Date of reserving
the judgment : 13th February, 2004.

Date of pronouncing
the judgment : 11th March, 2004.

JUDGMENT

The question involved in this First Appeal is whether the trial Court could award interest at a rate above 6% per annum on a transaction, during the pendency of the suit as well as from the date of decree till the actual payment.

2. The appellants awarded different contracts to the respondent for laying of pipelines and maintenance of water supply systems at Vasco da Gama. These contracts were awarded between September, 1982 to September, 1983 to the respondent. It appears that the respondent completed three of the works

within the stipulated time, out of the five contracts. Bills were submitted by the respondent which remained unpaid. The respondent, therefore, filed a suit on 4th December, 1998, against the appellants for recovery of an amount of Rs.37,965/-, which was later on amended to Rs.33,857.75 p. and for interest thereon of Rs.l,08,687/- alongwith further interest at the rate of 18% per annum, from the date of decree till realization. It appears that no written statement was filed by the appellants and the suit was fixed for ex parte orders on 9th June, 1999. The appellants filed an application on 22nd September, 1999, for setting aside the order fixing the matter for ex parte orders as also an application for condonation of delay. Both these applications were dismissed by the trial Court on 9th April, 2002. A revision was filed against this Order by the appellants which was withdrawn in view of the amendment to Section 115 of the Code of Civil Procedure. The appellants then filed their written submissions alongwith the statement of accounts in the trial Court. The trial Court on the basis of the record before it decreed the suit and awarded the respondents Rs.33,857.75 p. alongwith interest at the rate of 12% per annum, upto the date of filing of the suit. Further interest was awarded at the rate of 10% per annum till the actual payment.

3. The appellants have made a grievance that the trial Court was not justified in rejecting the application made by them for setting aside the order fixing the matter for

ex parte decree. According to the appellants, the circumstances due to which such an order was passed ought to have been considered by the trial Court before rejecting their application. It was submitted that the appellants should not be penalized for negligence of their advocate. It was also submitted that the appellants ought to have been permitted to file their written statement to defend the suit. It is urged that the trial Court was not justified in awarding interest at the rate of 12% per annum on an amount of Rs.33,857.75 p. when the appellants had already paid an amount of Rs.22,074/- on 10th April, 2002. It is further submitted that the transaction between the appellants and the respondent being one which was not commercial in nature, the trial Court could not have awarded more than 6% interest under Section 34 of the Civil Procedure Code.

4. I have perused the record of the trial Court. The roznama indicates that the advocate for the appellants has appeared on various occasions. In fact, the appellants were well-aware of the proceedings before the trial Court. Their advocate has appeared on numerous occasions prior to the Court fixing the matter for ex parte hearing. The order fixing the matter for ex parte hearing was passed on 9th June, 1999. Thereafter on 17th April, 2000, notice was issued to the Executive Engineer, Works Division IX (P.H.E.), P.W.D., Fatorda, to produce certain documents. This notice was received and the Executive Engineer appeared and produced the

requisite documents on 19th June, 2000. Even at this stage no application was preferred for setting aside the order of 9th June, 1999, fixing the matter for ex parte hearing. The advocate for the appellants continued to appear and it was only on 22nd October, 2001 that a new Government Advocate was appointed and an application was made thereafter for setting aside the order of 9th June, 1999. Therefore, the appellants had sufficient time to make such an application for recall of the order fixing the matter for ex parte hearing. The roznama indicates that the appellants were absolutely negligent and, therefore, the trial Court rightly did not set aside or recall his earlier order of 9th June, 1999. There is nothing to indicate that the advocate appearing for the appellants had not informed the appellants of the matter, or that it was on account of his negligence that the written statement remained to be filed. Assuming that the advocate was negligent, the Executive Engineer who appeared in order to produce certain documents on record was well aware of the proceedings in Court and even at that stage an application could have been made for allowing the appellants to file their written statement. However, no such application has been made. Therefore, the trial Court has committed no error by proceeding with the suit ex parte.

5. The trial Court has awarded interest on the amount of Rs.33,875.75 p., which was payable on the date of the suit. Admittedly, during the pendency of the suit an

amount of Rs.22,074/- has been paid to the respondent on 10th April, 2002. This amount would have to be deducted from the amount of Rs.33,857.75 p. and interest would have to be calculated accordingly.

6. Adverting now to the interest payable to the respondents during the pendency of the suit and for the period subsequent to the decree, the submission made on behalf of the appellants is that interest could have been awarded only at 6% per annum under Section 34 of the Code of Civil Procedure, in view of the fact that the transactions were commercial in nature, and the Court had no jurisdiction to grant any amount more than 6% as interest when the contract did not specify any other amount. The question of granting interest during the pendency of the suit has been considered by the Apex Court in the case of **Secretary, Irrigation Department, Government of Orissa & Ors. vs. G. C. Roy**, AIR 1992 SC 732, where in an arbitration proceeding the Apex Court has held that the arbitrator has powers to award interest pendente lite. Similarly, in a suit the Court would have jurisdiction to award such interest. Therefore, the interest awarded by the trial Court at the rate of 10% per annum from the date of filing of the suit till the decree must be maintained.

7. The question is whether the trial Court had jurisdiction to grant interest at 10% per annum even after the decree was passed till the date of realization. Admittedly,

the contract entered into between the appellants and the respondent was:-

(i) for construction of a pump house at Sada;

(ii) extension of water supply distribution net work at Rachol;

(iii) shifting and re-location of the mains at Bogmalo near Dabolim Airport;

(iv) extension of distribution of pipeline of Vaddem, Vasco da Gama, near Goa Shipyard; and

(v) construction of chamber at Vasco-Cortalim road.

These works were obviously civil works which were to be undertaken for the public at large. They could, by no stretch of imagination, be considered to be commercial transactions between the appellants and the respondent. The construction of such works as mentioned above cannot be considered to be connected with any industry, trade or business of the appellants as held in the case of **State of Maharashtra & Ors. vs. Saifuddin Mujjaffarali Saifi**, reported in AIR 1994 Bom. 48. Contracts for construction of bridges, roads, highways, would not amount to commercial transactions and, therefore, only 6% interest can be levied on the principal amount, payable from the date of the decree. In the case of **Satara Zilla Parishad, Satara through its Chief Executive Officer vs. Shri Dilip Bhaushaheb Pawar**, 2002 Vol. 104 (1) Bom.L.R. 381, this Court was considering contracts entered into between the Zilla Parishad and the respondent in that case for transportation of goods pertaining to the various departments

of the Zilla Parishad. This Court has taken the view that maintaining the rate of interest determined by the trial Court (which was more than 6%) for the period from the date of institution of the suit till the date of decree was not difficult. However, with regard to the period from the date of decree till payment, the Court held that since there was no averment in the plaint that the subject transaction was a commercial transaction, nor was there any evidence adduced that it was a commercial transaction, interest of only 6% could be awarded in view of the mandate of Section 34 of the Civil Procedure Code. Therefore, the award of interest at the rate of 10% per annum from the date of the decree till realization cannot be permitted.

8. In case of **State of J. & K. & Anr. vs. Dev Dutt Pandit,** AIR 1999 SC 3196, relied upon by the learned counsel for the respondent, the Apex Court considered interest awarded in an arbitration award. The arbitration was in respect of tender of the contractor for earth work, excavation, minor drainage crossing, overhead crossing, road bridges and cement concrete lining of Ravi Canal Project. The Apex Court held that there was nothing on record to show that the interest awarded by the arbitrator at the rate of 10% per annum was in contravention of Section 34 of the Civil Procedure Code. On the basis of this judgment, it is submitted on behalf of the respondent that even in respect of such works which could be considered as sovereign functions of

the State, the Apex Court had held that the State was liable to pay more than 6% interest. However, this judgment indicates that there was nothing on record produced by the parties before the arbitrator to show that the works did not consist of a commercial transaction. In the present case, in view of the judgment of this Court in **Satara Zilla Parishad, Satara vs. Shri Dilip Bhaushaheb Pawar** (supra) and **State of Maharashtra vs. Saifuddin Mujjafarali Saifi** (supra), I am inclined to take the view that the appellants are liable to pay only 6% interest from the date of decree till realization.

9. The Appeal is, therefore allowed partly. The decree stands modified to the aforesaid extent.

SMT. NISHITA MHATRE, J.

mc.